No. 751

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In the Supreme Court of the United States

OCTOBER TERM, 1964

FRANK J. RICHARDS and JULIUS FREDERICK SPINDLER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

HERBERT J. MILLER, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
PAUL C. SUMMITT,
Attorneys,
Department of Justice,
Washington, D.C., 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 336 F. 2d 678.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1964. A petition for rehearing was denied on October 13, 1964. Mr. Justice Douglas extended the time for filing a petition for a writ of

certiorari to and including December 12, 1964, and the petition was filed on December 11, 1964. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence of telephone conversations was properly admitted at the trial of petitioners for wire fraud.

2. Whether the conduct of the trial judge deprived petitioners of a fair trial.

STATEMENT

Petitioners and a co-defendant, Charles Rhodes, were convicted after a jury trial in the United States District Court for the Southern District of California on all counts of a 15-count indictment charging "fraud by wire," in violation of 18 U.S.C. 1343 (Tr. 1332-1336).[1]

There was uncontradicted evidence of many interstate telephone calls by which several lending organizations, which had made loans on automobiles, were defrauded. The operation of the fraud is illustrated by the following example, used also by the court of appeals in its opinion.[2] On August 31, 1962,

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[1] The record is in seven volumes. Volumes II-VII contain the consecutively paginated transcript of trial and will be referred to as Tr.

[2] Similar operations in relation to five other vehicles appear in the record (Tr. 115-134, 227-235, 326-338, 342-345, 361-368, 537-550).

an assistant collection manager of the Spokane office of Pacific Finance received a telephone call from a person who gave his name as Jack Curtis and said that he represented the National Auto Recovery Service in Hobbs, New Mexico (Tr. 170-172). "Curtis" stated that National Auto Recovery had located a 1961 Dodge automobile belonging to Pacific Finance at Hobbs, New Mexico, and asked "if the fellow was behind or delinquent in his payments" and whether Pacific Finance wanted National to pick up the automobile (Tr. 171-173). Since Pacific Finance was the legal owner of the Dodge and the registered owner was behind in his payments, the caller was told to pick up the car (Tr. 172-173). On September 14, 1962, "Curtis" again called the Spokane office and said that there was a bid of $1350 for the vehicle (Tr. 173). In response to this call, Pacific Finance sent a letter authorizing sale and guaranteeing title to the National Auto Recovery Service in Hobbs (Tr. 174). The Dodge was sold in Hollywood on September 19, 1962, for $1,000 (Tr. 647, 649-652), but none of the money was sent to Pacific Finance (Tr. 177-178, 184)

The Hobbs address which "Curtis" had given to Pacific Finance on the telephone was that of the Woodruff Answering Service (Tr. 195-196), which had been hired by telephone by "Jack Curtis," representing himself to be with the National Auto Recovery Service (Tr. 195, 197-198). "Curtis" communicated with the answering service periodically to get messages and telegrams (Tr. 204-206). Mail received by the answering service for National Auto

Recovery was forwarded to a post office box in San Diego (Tr. 206-207). The calls to the defrauded finance companies originated from two telephones in San Diego (Tr. 458-464). During the relevant period thirty-three calls were made from these telephones to the answering service in Hobbs (Tr. 465-466). Petitioners Spindler and Richards were seen frequently at the address where one of the telephones was located; they used that telephone (Tr. 386-387, 389, 391, 417, 433-434), which had been obtained by defendant Rhodes under the name of "Kenny Idom" (Tr. 452-453, 673-675). The application for the other telephone was signed "Edward L. Bates" and gave as a local address, "Hitching Post, El Cajob Boulevard" (Tr. 457). Between September 22, 1962, and October 15, 1962, petitioners were registered together at the Hitching Post Motel. Spindler was registered under the name of "Ed Bates" (Tr. 271-275, 284-288). After Richards left in October, defendant Rhodes moved in with Spindler (Tr. 285-287). During this period, Spindler had in his possession one of the automobiles involved in the frauds (Tr. 290, 596). He was involved in the sale of three of the fraudulently acquired automobiles (Tr. 123, 648-651, 654-655). Richards was involved in the sale of two of them (Tr. 305-306).

ARGUMENT

1. Petitioners' argument that evidence of the telephone conversations between "Curtis" and the defrauded parties was inadmissible is without merit.

The evidence was admitted not to prove the truth of any statement made in the conversations but what was said. Proof of the very making of the statements and requests was admissible as evidence of the nature of the scheme regardless of who participated in the conversations. See *e.g.*, *Reynolds* v. *United States*, 225 F.2d 123, 131 (C.A. 5), certiorari denied, 350 U.S. 914.

When the evidence of the telephone conversations was admitted, the jury was instructed that the evidence should be disregarded unless it was connected up with the defendants by independent evidence (Tr. 118, 121). And, in the charge, the court fully and carefully instructed the jury that statements made or acts committed in furtherance of a common plan or scheme could not be considered against a defendant who was not present when the statements were made or acts committed, unless he was shown by independent evidence to have participated in the scheme (Tr. 1297-1300). As the court of appeals ruled, there was "voluminous circumstantial evidence" from which the jury could conclude that the petitioners had either made the telephone calls themselves or were participants in the fraudulent scheme pursuant to which the telephone calls were made. See *Carbo* v. *United States*, 314 F. 2d 718, 743 (C.A. 9), certiorari denied, 377 U.S. 953.

2. Petitioners' assertion that the conduct of the trial judge deprived them of a fair trial is unfounded. The questions which the court asked petitioners (Pet. 4) were impartial and designed to clarify the evidence concerning complex combinations of events,

telephone numbers and automobile identifications (Tr. 864-874, 935-946). Such questioning was clearly proper. *Glasser* v. *United States*, 315 U.S. 60, 82. The remarks of the court to which petitioners object (Pet. 4) are quoted out of context. None of them was made in the presence of the jury, and in the context in which they were made none of them evidences the bias which petitioners now attribute to them (Tr. 320, 783, 801). As the court of appeals stated (336 F. 2d at 682):

> Such examination of the witnesses as was here made by the court was done in an entirely impartial manner and the comments of the district judge to counsel in the case, when taken in context, were in no way improper or prejudicial to either of the appellants.

There was no objection at trial to the instructions to the jury on aiding and abetting. In any event, they were proper. Petitioners did not deny their participation in the sale of the automobiles involved in the fraudulent scheme, but based their defense on the assertion that they had no knowledge of the fraud and were innocent victims of the real wrongdoer, "Jack Curtis." It was in this connection, in indicating that the key issue in the case was whether petitioners had knowledge of the fraud and knowingly participated in its perpetration, that the trial court stated to the jury that a fraud had been perpetrated and that there was no question that petitioners had aided and abetted someone (Tr. 1317-1318). Moreover, the jury was repeatedly admonished that it was the sole judge of the facts and could disregard the

judge's remarks entirely (Tr. 1314, 1317, 1318). T court of appeal correctly concluded that the giving of the instructions in question "was neither plain nor any error" (336 F. 2d at 682).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
PAUL C. SUMMITT,
Attorneys.

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